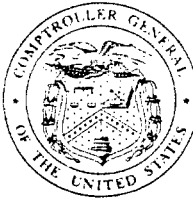


DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

Proc I

9961

FILE:

B-192454

DATE: April 26, 1979

MATTER OF:

CompuScan, Inc.

DLG 01434

*[Protest Alleging Awardee's Technical Proposal and Delivery Schedule
Were Improperly Evaluated]*

DIGEST:

1. RFP required Tempest certified equipment. After receipt of best and final offers, agency determined that no offeror proposed technically acceptable system that could meet Tempest certification requirement. Agency then deleted requirement but did not notify competitors and other qualified offerors. GAO views relaxation of requirement as substantial change in agency's needs and agency's failure to amend RFP violated applicable procurement regulations and sound procurement policy.
2. Contention that RFP specified only off-the-shelf equipment is without merit where RFP states that if any item in the performance specification precludes off-the-shelf equipment, offeror is requested to propose solution for evaluation.
3. Protester argues that awardee's proposal did not describe how proposed equipment will satisfy each specification as required by RFP. While agency report does not respond to this protest basis, GAO reviewed awardee's proposal and observes that explanation was provided for each specification. In view of award, agency obviously viewed awardee's description as compliant. After reviewing both protester's and awardee's explanations, GAO has no basis to disturb agency's determination.
4. Protest that awardee is not capable of meeting search time of 4 seconds as stated in its proposal is matter related to awardee's responsibility. GAO will not consider merits of protest against agency's affirmative responsibility determination, absent circumstances not present here.

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5. Protester, after reviewing qualifications of agency's sole technical evaluator, challenges his technical competency. Where protester essentially contends that an evaluator is appointed in bad faith, prior decisions indicated that GAO will make subjective judgment on evaluator's qualifications. Absent such allegation, GAO's standard of review is whether technical evaluation is rationally based. Here, after considering merits of protester's contentions, GAO has no basis to conclude that technical evaluation was not reasonably based.
6. Protester contends that awardee cannot meet delivery schedule and should not have received favorable evaluation for proposed timely delivery. Proposals must be evaluated as submitted; therefore, GAO has no basis to question awardee's point score for proposed timely delivery. Further, awardee's capability to deliver timely is matter relating to agency's affirmative determination of responsibility and, in circumstances, will not be questioned by GAO.
7. Contention that protester proposed timely delivery in initial proposal but was not afforded proper point score is without merit where offeror's best and final offer stated that required paper tape punch could not be timely delivered.

ABC 00477
DLG 01434
CompuScan, Inc., protests the Defense Communication Agency's (DCA) award of contract No. DCA200-78-C-0023 to Sperry Univac, a division of the Sperry Rand Corporation (Univac), for the lease of up to 50 Optical Character Recognition (OCR) Terminals and maintenance support for use at multiple locations worldwide. The initial award was for 20 terminals with maintenance in the amount of \$4,212,640. CompuScan essentially

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contends that (1) Univac's technical proposal was improperly evaluated and did not offer to meet mandatory solicitation requirements, (2) Univac's proposed delivery schedule was unrealistic and, thus, improperly evaluated, and (3) CompuScan's proposed delivery schedule should have received more points in the evaluation scheme. CompuScan requests that DCA terminate Univac's contract, reject Univac's unacceptable proposal, reevaluate the remaining proposals, and make a new award.

I. EVALUATION OF UNIVAC'S TECHNICAL PROPOSAL

The request for proposals (RFP), as amended, revealed that proposals would be evaluated by considering technical sufficiency (including engineering design, software, maintenance, and human engineering), delivery schedule, and price. The amended RFP disclosed that technical sufficiency was the most important factor and it was more than twice as important as either delivery or price, and delivery was more important than price.

CompuScan contends that Univac's proposal was not technically acceptable because the equipment offered did not satisfy these mandatory RFP requirements: (a) Tempest certification prior to award; (b) off-the-shelf equipment; (c) complete description of how the system would work, and (d) capability of searching 8,000 plain language addresses (PLA) on line.

A. Tempest Certification Prior to Award

The amended RFP expressly provided that the OCR device or system must receive Tempest certification prior to contract award. CompuScan believes that Tempest tests are vital to the security of any sensitive information contained in messages processed through the system and to prevent or suppress any compromising emanations from leaking to potential enemies. CompuScan states that systems can only be said to meet Tempest requirements when they have been tested to the appropriate

Government specification in a certified laboratory, and the tests show that all required results have been met. In this regard, the RFP stated that the OCR device or system shall meet Tempest requirements of the National COMSEC/EMSEC Information Memoranda (NACSEM) 5100 series.

CompuScan notes that Univac's proposal states that its equipment is Tempest certified, but elsewhere requests \$50,000 for software development; from this, CompuScan concludes that Univac did not have the required software at the time of award and obviously Univac could not have passed the Tempest requirements as a complete system, since such tests must be made on an actual operating, total-tested system with integrated hardware and software in place.

CompuScan learned, pursuant to the Freedom of Information Act, that the person who performed the technical evaluation stated:

"My basic evaluation criteria were for a complete system meeting all technical specifications with Tempest certification to follow at a later date if necessary."

CompuScan concludes that the "basic evaluation criteria" used by the evaluator failed to meet the ground rules and requirements laid down by the solicitation and that his error resulted in a grossly unfair award to Univac.

In response, DCA reports that none of the offerors could meet the specification calling for Tempest certification; accordingly, the Government had to delete this requirement and provide for alternate testing and certification procedures.

In reply, CompuScan first notes that at no time prior to contract award was CompuScan ever notified of any change in the ground rules which called for Tempest-certified systems. CompuScan

disagrees with DCA's decision to delete that requirement as a peril to the security of the communications of our Armed Forces. CompuScan also contends that if there was no requirement for Tempest, the RFP should have been amended to permit CompuScan to have proposed an alternate system at a fraction of the cost. In addition, CompuScan notes that many other OCR manufacturers could have submitted offers and the Government would have saved millions of dollars.

Secondly, CompuScan argues that while the Univac system does not meet the Tempest requirement, the CompuScan system does. CompuScan states that its equipment has been Tempest-certified and has passed all tests on an individual basis and on a system based with hardware and software in place and that the test results are available at SCOCE, a subsection of the National Security Agency. CompuScan further states that its systems have been shipped to Government agencies, such as the Defense Intelligence Agency (DIA).

CompuScan states that the Tempest certification for its system was approved by DIA in April 1978 and filed with SCOCE by the testing laboratory, National Scientific Laboratories, on April 25, 1978.

In rebuttal, DCA reports that the contracting officer informally deleted the Tempest requirement prior to award when evaluation of proposals demonstrated that no offeror had a Tempest-certified system which met all other requirements. DCA reports that Univac must meet Tempest levels of NACSEM 5100 but Univac's minicomputer had not passed Tempest testing.

DCA further reports that CompuScan has no Tempest certification for a system configured to meet the RFP's performance requirements and that the user military department has not certified even the unacceptable CompuScan system. In that regard, DCA states that CompuScan was "nonresponsive" to the RFP because its offered system (which

could meet the delivery date) could not meet the requirements for expandability from 500 to 8,000 PLA, and for a paper punch speed of 110 characters per second (CPS); CompuScan could only offer a system meeting the specifications approximately a month after the required initial delivery date. DCA contends that Univac agreed to meet the required delivery date with a responsive system; thus, rather than being unfairly treated, CompuScan was given every conceivable advantage and kept in the competition and was not being rejected initially as being "nonresponsive."

Finally, DCA argues that "prerequisite software" does not require the software's existence prior to award, in fact, CompuScan also would have had to modify software to expand 500-PLA to 8,000-PLA capability.

Defense Acquisition Regulation (DAR) § 3-805.4 (1976 ed.) governs the manner in which changes in Government requirements are to be communicated to offerors and potential offerors. It provides that when, either before or after receipt of proposals, changes occur in the Government's requirements or a decision is made to relax a requirement, such change shall be made in writing as an amendment to the RFP. It also provides that no matter what stage the procurement is in, if substantial changes are made, a new solicitation should be issued and any other qualified firms should be added to the mailing list. Here, because of the RFP's mandatory Tempest-certification-prior-to-award requirement, competition was narrowly restricted and excluded all OCR manufacturers who could not meet that requirement. In these circumstances, the decision to relax that requirement was a substantial change and should have been communicated to all offerors and all other qualified potential offerors in a new solicitation. By not doing so, DCA violated the DAR.

We note that DCA's informal decision to relax that requirement was based on its conclusion that CompuScan's proposed equipment was not acceptable. DCA's conclusion is based on CompuScan's revised technical proposal dated June 28, 1978, which stated as follows:

"CompuScan can ship Systems containing 500 PLAs by July 1978. We can ship Systems containing 8000 PLAs within four (4) months after Award of Contract. Similarly, we can ship Paper Tape Punches with a speed of 75CPS by July 1978. We can ship Paper Tape Punches with a speed of 110 CPS within four (4) months after Award of Contract."

Since the RFP required (1) "the capability to expand to at least 8000 PLA's" (amendment dated April 17, 1978); (2) a "high speed (110-300 CPS paper tape punch" (paragraph 4.1, section "F," part II, RFP); and (3) delivery at the rate of four systems in the month of September 1978, CompuScan's delivery compliant proposal was clearly technically unacceptable. Nevertheless, while that establishes that CompuScan would not be entitled to award under the RFP, that did not provide a basis for DCA to ignore the applicable DAR requirements to amend the solicitation and provide all qualified offerors an opportunity to compete because CompuScan and others may have been able to meet the RFP's technical requirements with non-Tempest-certified equipment at lower cost. Accordingly, this aspect of the protest is sustained.

B. "Off-the-shelf" equipment

CompuScan contends that the RFP specified only off-the-shelf equipment. The relevant portion of the RFP states:

"Development: This specification is to be met with off-the-shelf equipment. If any item in this performance specification precludes off-the-shelf equipment, the vendor is requested to propose a solution for evaluation."

CompuScan argues that since Univac's proposal requested \$50,000 for software development, Univac could not have had the required off-the-shelf equipment. CompuScan also states that until a few days before the deadline for submission of offers, Univac was negotiating with CompuScan to buy software for this system and Univac informed CompuScan that it did not have any software package of its own that would meet the RFP requirements.

CompuScan's argument is without merit because the RFP, as quoted above, expressly permitted offerors "to propose a solution for evaluation" when off-the-shelf-equipment would not satisfy the requirement.

C. Functional Description of System

The RFP's Instructions for Preparation stated that the vendor must describe how the proposed equipment will satisfy each paragraph or subparagraph of the specifications and state-ments that the vendor is fully compliant with the requirements of paragraph or word-for-word parroting of paragraphs would not be acceptable. CompuScan contends that Univac's proposal fails to comply with this instruction since Univac supplies general puffery about its hardware with no description at all about how the software works. Univac also states that it will meet the RFP's requirements, but does not describe how it would do it.

As an example, CompuScan points to one part of the RFP which describes the message formatting, editing, and file updating requirements of the system. CompuScan contends that Univac's proposal addresses none of these specific technical points but simply states that Univac is competent and describes in general terms the proposed hardware, by saying, "Univac offers you speed, power, reliability, availability and opportunity for future growth at a sensible price," and "Univac's proposed system is fully competitive, both in costs and in high standards of the components proposed." CompuScan argues that Univac's failure to describe the software makes its proposal unacceptable.

Although the DCA report does not address this basis of protest, DCA provided a copy of Univac's proposal which we reviewed. We note that in response to paragraph 7 of the specifications entitled, "Specific Requirements - Software," Univac devotes five full pages of its proposal describing how its software would meet the RFP's requirements. Whether Univac's description complied with the RFP's description requirement is primarily a matter of proposal evaluation. Here, DCA, in view of the award to Univac, obviously concluded that Univac's software description and other specification descriptions were compliant. In our review of DCA's determination, our Office will not substitute our judgment and will not disturb DCA's determination unless it is shown to be arbitrary or in violation of procurement statutes or regulations. See Ads Audio Visual Productions, Inc., B-190760, March 15, 1978, 78-1 CPD 206. After considering Univac's and CompuScan's explanations in their proposals, we have no basis to disturb DCA's determination.

D. Capability to expand to at least 8,000 PLA's Efficiently

The amended RFP stated that the file shall contain as a minimum 500 PLA's and associated

RI's "with the capability to expand to at least 8,000 PLA's and associated RI's." In this regard, CompuScan states that the system must be capable of searching 8,000 PLA's on line; since 8,000 PLA's have an average of 40 characters each, the total size of the PLA table will exceed 300,000 characters. CompuScan contends that Univac proposed to meet this requirement by means of a cassette unit which can read and write at a rate of 600 characters per second and can search at 120 inches per second; therefore, a complete search of 300,000 characters will require 500 seconds not 4 seconds, as stated by Univac. CompuScan concludes that it would take about 30 hours using the Univac proposed equipment to look up all the PLA's on a given 200-address message, worst case, which is far slower than the manual system.

In response, DCA reports that in its estimate, at the maximum utilization rate, the Univac system could perform the required tasks in only a very few minutes. Univac contends that the CompuScan estimates are wrong, in part, because CompuScan erroneously assumed a serial search and a single tape read.

CompuScan is not contending that Univac failed to propose a system capable of satisfying the RFP's expansion requirement. CompuScan is contending that Univac's system cannot and will not be able to perform in the time stated in Univac's proposal. Because Univac stated that its proposed system could perform certain tasks within certain time constraints, its proposal was evaluated on that basis and award was made on that basis. The awardee is contractually bound to provide a system that will perform as offered under penalty of breach of contract. Under our Bid Protest Procedures, we do not consider matters of contract administration relating to whether the awardee will deliver the proposed system. Neither do we consider matters related to affirmative determinations of responsibility, that is, whether the awardee can deliver the proposed system, with the exception of alleged fraud or bad faith, which is not the case here. Virginia-Maryland Associates, B-191252, March 28, 1978, 78-1 CPD 238. Accordingly, this basis of protest is dismissed without consideration on the merits.

E. Alleged Improper Technical Evaluation of CompuScan's Proposal Relative to Univac's

Consistent with the RFP's disclosed evaluation factors, DCA used a weighted evaluation scheme and the two offeror's proposals received the following scores:

| <u>Factors</u> | <u>RFP's Weight</u> | <u>Univac</u> | <u>CompuScan</u> |
|---|---------------------|---------------|------------------|
| [60] Technical | | | |
| Sufficiency | | [58] | [57] |
| Engineering Design | 21 | 20 | * |
| Software | 17 | 16 | 16 |
| Maintenance | 13 | 13 | * |
| Human Engineering | 9 | 9 | * |
| [25] Delivery | 25 | 25 | 10 |
| [Timely delivery gets maximum 1/2 point penalty per day of delay] | | | |
| [15] Price | <u>15</u> | <u>15</u> | <u>13.2</u> |
| [100] Total | 100 | 98 | 80.2 |

* / not disclosed in record.

CompuScan argues that Univac's proposal:

- (a) did not have a Tempest-certified system;
- (b) did not have the prerequisite software;

- (c) presented parroting of phrases and puffery, rather than the required technical discussion and description; and
- (d) required up to 30 hours to process a single message.

From this, CompuScan concluded that it is beyond comprehension how Univac was awarded a score of 58 points out of 60 for technical sufficiency, as compared with CompuScan's 57 points. CompuScan believed, therefore, that the technical evaluation was improper and must not have been performed by anyone with technical competence. After some effort, CompuScan learned that the technical evaluation was performed by one Navy ensign, whose "most significant civilian and military education included High School, Radioman School, Teletype Maintenance School, Speedkey Operator School and Cryptographic School;" he also was an experienced teletype repairman and radioman.

CompuScan essentially contends that the evaluation of a highly technical and complex computer terminal system:

- (1) that employs advanced state-of-the-art techniques in the field of optical character recognition and telecommunications micro-processor message processing;
- (2) that is to be used by the Navy (and later by the Air Force) at bases all over the world to transmit a large part of their communications traffic;
- (3) that requires the most advanced techniques to suppress any compromising emanations and radiation in order to protect the security of the messages from the enemy; and
- (4) that is supposed to process and to protect communications affecting the national security of the United States,

requires the technical evaluation of a skilled electrical engineer with a deep expertise in computers and not someone whose technical training does not go beyond the repair of a radio or a teletype machine.

DCA reports that its technical evaluator had over 15 years' experience in Navy Communications, was a Senior Chief Radioman, was Chief-in-Charge at the Naval Telecommunication Center at Agnano, Italy (18 months) (and while there used an operational CDC MENS II, a stand-alone OCR), had a tour at Communications Area Master Station (Norfolk) as Analysis Officer dealing with hardware and software aspects of the major automated message processing system installed there, and his hobbies include minicomputer-software programming.

In response, CompuScan contends that a CDC MENS II OCR is extremely simple and elementary and belongs to an earlier technological generation; it not only lacks a computer, but it has almost nothing to do with the new intelligent terminal containing a built-in computer with sophisticated storage devices. CompuScan also contends that a hobby of computer software programming does not adequately replace engineering schooling, training, and experience in Stand-Alone Intelligent Terminals and computer technology required to evaluate a multimillion dollar procurement that affects the security and the vital interests of the United States and its Armed Forces.

In reply, DCA reports that the CDC MENS II is functionally the same as the OCR required by the specification and it employs a CDC 1700 (32K byte) computer and two 1.5 byte disk drives plus a paper tape punch and printer. DCA also points out that the specification was directed toward off-the-shelf equipment. DCA states that the offeror's systems must meet essential operational requirements including man-machine interface and the evaluator's background lent itself explicitly to the evaluation of those aspects.

With regard to the qualifications of the technical advisers and evaluators, as a general rule, we will not become involved in appraising the qualifications of contracting agency personnel. See Ads Audio Visual Productions, Inc., supra; Joseph Legat Architects, B-187160, December 13, 1977, 77-2 CPD 458. Further, we have held that the important and responsible positions held by agency evaluators constitute a prima facie showing that they are qualified and with nothing more than a protester's unsubstantiated allegations regarding an evaluator's qualifications, we would have no basis to examine or question the evaluator's qualifications. Ads Audio Visual Productions, Inc., supra.

In the matter of Dikewood Service Company, 56 Comp. Gen. 188 (1976), 76-2 CPD 520, the protester challenged, as unusual, the number of changes made to the composition of the technical evaluation board personnel and alleged that well-qualified individuals were removed in favor of less qualified individuals. GAO investigators reviewed the personnel files of the individuals concerned and interviewed all but one of the evaluators. We concluded that all persons concerned were well qualified and we found no substantial difference between the qualifications of the evaluators removed from the board and those who remained. We are unaware of any decision concluding that an evaluator was not qualified.

The Dikewood Service Company decision and other decisions represent this Office's implicit recognition that (1) agencies have a statutory- and regulatory-based duty to fairly evaluate proposals, and (2) technically qualified agency personnel are required to perform the evaluation.

The Dikewood Service Company decision and other decisions of this Office may have led protesters to believe that we would generally conduct an audit of an evaluator's qualifications to determine his or her competency to evaluate particular

proposals; however, we believe that the audit approach should be reserved to situations where a protester has made some showing of bad faith in the appointment of an evaluator. Here, there has been no such showing. In this case, we will not audit to subjectively judge the evaluator's qualifications. Instead, we will employ a more objective standard, i.e., we will review the technical evaluation to determine whether it is rationally based. Here, the objective standard is the better approach because it matters not whether the evaluator is qualified "on paper"; what matters is the reasonableness of the evaluation. Furthermore, we note that, as in agency affirmative determinations of responsibility, performance and costly contractual changes may be required to compensate for such improper technical evaluations; therefore, it is in an agency's own interest to select qualified evaluators and perform proper evaluations.

To apply the objective test here, we must look to the protester's specific contentions of improper technical evaluation. Each was discussed at length above and none were found to be improper. Accordingly, we have no basis to question the technical evaluation.

II. UNIVAC'S DELIVERY SCHEDULE

CompuScan notes that only one contractor, Univac, stated that it could deliver as scheduled, and thus obtained the maximum points (25) for delivery. CompuScan argues that, in light of all of the above facts, there was no way in the world for Univac to make any of the deliveries required and it should have been penalized 25 points for this factor.

When an offeror proposes to meet the Government's required delivery schedule, its proposal is acceptable and deserving of an appropriate score. When award is made based on that offeror's proposed delivery schedule, the Government has

the right to demand delivery as scheduled in the contract. The awardee must deliver as required by the contract or be in breach. Accordingly, to the extent that CompuScan's contention relates to Univac's capability to deliver as proposed, the matter relates to responsibility. Where, as here, the contracting agency has affirmatively determined that an offeror is responsible, our Office will not object, absent limited circumstances not present here. Unitron Incorporated, B-191273, July 5, 1978, 78-2 CPD 7 (successful bidder's capability to meet delivery requirement was not to be questioned in similar circumstances). Therefore, this aspect of CompuScan's protest is dismissed.

III. COMPUSCAN'S DELIVERY SCHEDULE

CompuScan argues that it did not state that delivery would be 30 days late but its initial proposal stated that it was capable of performing all the requirements of the solicitation including all delivery schedules. Again, in its cover letter of its best and final offer, it stated, "CompuScan can deliver one system in July 1978, one system in August 1978, four systems in September 1978, and two or more systems per month thereafter."

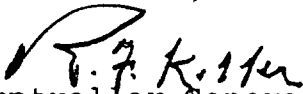
We note that although CompuScan stated in one section of its best and final offer that it could meet the delivery requirement in another section, it stated that it could not deliver paper tape punches with the required speed until after the RFP required delivery. DCA interpreted CompuScan's specific exception to the delivery requirement as overriding its prior general offer to timely deliver. We cannot disagree with the reasonableness of DCA's interpretation.

IV. CONCLUSION AND RECOMMENDATION

Protest sustained in part. We conclude that DCA's relaxation of mandatory RFP requirements without

notifying all potential offerors violated the provisions of DAR § 3-805.4. By letter of today, we are bringing this matter to the attention of the Director, DCA, so that corrective action can be taken to avoid this impropriety in future procurements. Further, we are recommending that the contract with Univac be limited to the 20 basic systems in the award and that the optional 30 systems, if required, be the subject of a fully competitive procurement.

We may not recommend any additional corrective action because at the time the matter was ready for our Office to consider the merits, under the contract's terms, the contract was to be 40 percent complete (DCA advised that Univac was on schedule) and, because of the contractor's need to incur costs for the balance of the items required under the contract in order to meet delivery requirements, the cost of termination for convenience relative to the total price of the contract was too high. Accordingly, a termination for convenience recommendation would not be in the best interests of the Government.


Deputy Comptroller General
of the United States